

The Asbestos Mess

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The Senate recently rejected the best solution to the asbestos mess yet devised. The legislation, co-authored by Sens. Arlen Specter and Patrick J. Leahy, would have created a huge trust fund for asbestos victims financed by corporate asbestos defendants, administered by the government, and projected by the nonpartisan Congressional Budget Office to cost the American taxpayers little or nothing.

The proposed legislation is very far from perfect, but something like it is essential for two reasons. First, the victims of asbestos exposure—some of whom already have or will develop extremely serious and often fatal illnesses—are being shortchanged because of the failures of the current tort system as applied to mass injuries of this kind. Second, the tort system has become a graveyard even for companies with tenuous or nonexistent links to asbestos, as the older firms with more direct responsibility (more than 70 so far) descend into the great maw of bankruptcy.

Driving the legislation was an inescapable reality: Asbestos liabilities are now so large that they have become everybody's problem, which can only be solved if all affected interests compromise and accept a semblance of "rough justice." The just-defeated trust fund would have done just that. Asbestos victims might have to accept less compensation than they would have gotten had they won the litigation lottery, and the asbestos producers would have to pay into the fund based on a formula predicting what their future liabilities in the tort system might be. By paying claimants only if and when they suffered some disability (most claimants are still functionally unimpaired), and by limiting what their lawyers could charge, the most seriously injured victims would receive swift, certain and generous compensation.

When a political logjam developed, however, the federal government refused to break it by contributing anything to the proposed fund, leaving everyone else holding the bag. To see the perversity of its position, a short history lesson is in order. It was asbestos used in shipyards operated by the U.S. Navy beginning in World War II that launched the tidal wave of claims that have bankrupted so many companies since Johns-Manville went under in 1982. Like its private asbestos suppliers, the Navy knew about some of the health risks posed by asbestos. But in its haste to build ships, the Navy continued to expose its shipyard workers to asbestos well into the 1960s.

The Navy was able to avoid the asbestos liabilities that crushed private suppliers because sovereign immunity limits the victims' power to sue the federal government. This doctrine left the private defendants alone to bear the vast liabilities—including those caused by the government—forcing many of them into bankruptcy, where victims typically receive only a few cents on the dollar value of their claims. Without the government's deep pockets to pay its own victims, many of them have had to settle for this pittance with those private defendants who remain solvent. Some received nothing at all

Alas, this is not the first time the federal government has shirked fiscal responsibility for serious injuries and deaths for which it bore some blame. During the Vietnam War, the Pentagon bought the herbicide Agent Orange from chemical manufacturers and sprayed huge quantities of it in large swaths of the war zone. Beginning in the 1970s, American and foreign soldiers and civilians sued the government and its suppliers for the injuries they claimed resulted from exposures to Agent Orange. During the same period, federal uranium mining and testing programs in western states engendered lawsuits against the government by miners, workers and downwind residents for their injuries and deaths.

As in asbestos, the government invoked sovereign immunity in each of these cases, citing a statute that shields it from liability for harms caused by its discretionary policy choices. The courts upheld this defense, as the law required. But it is wrong for the government to hide behind this legal immunity and walk away from

the asbestos imbroglio. Not only did the Navy expose workers to extensive asbestos while aware of some of its risks; those risks were much clearer and larger for asbestos than they were for Agent Orange, radiation and other dangers produced by government activities.

The government's intransigence is also politically and economically irresponsible. Its refusal to contribute its fair share to a congressionally mandated trust fund may permanently doom that solution. Yet leaving asbestos-related harms in the tort system will predictably bankrupt even more companies whose links to asbestos are far more peripheral than those of the government. This penny-wise, pound-foolish and morally obtuse policy will only multiply the immense damage that asbestos has already wrought on innocent workers and communities.

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